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OUR LAND LAWS AGAIN.

An editorial in the March LAW REGISTER, p. 928, when defining "A good lawyer," says: "The laws themselves are not seldom imperfect or unjust, and whenever they are so, I insist upon the duty of those who know them best, and know best how to improve them, to make their knowledge available for the public good."

Our land laws, because of their complexity, technicality and antiquity are peculiarly within the keeping of the bench and bar. The layman-lawmaker knows next to nothing of them and is wholly incompetent to reform them. From the lawyers of the state reform must come, if at all. These laws have always been and they will always be in our hands and the responsibility for present conditions can not be shifted to other shoulders.

But lawyers have never been enthusiastic reformers. What was good enough for their grandfathers is generally good enough for them. Conditions must grow absolutely intolerable before the bar will offer a remedy which they alone are, in many cases, competent to suggest.

Owing to a larger familiarity and better acquaintance, perhaps, it is peculiarly true that some of the older and more influential members of the profession are usually found arrayed against reforming old laws. Some notable instances may be found printed in the January REGISTER (12 V. L. R. 750), where it is shown how Blackstone and others opposed the change of the language of the law from Norman-French and Latin to the tongue of the common people, and how legislation allowing plaintiffs and defendants to give evidence in their own behalf, permitting counsel appearing for prisoners charged with felony to make a speech, abolishing the Star Chamber, prohibiting torture and allowing prisoners' witnesses to be examined on oath, were each opposed by some of England's foremost lawyers. Every one is familiar with the persistent and almost bitter hostility against our two most drastic statutes hereafter referred to—Homestead Exemptions and Married Women's Act—felt and expressed by some of Virginia's greatest lawyers. Yet after an experience of many years, who will be found to deny the salutary effect of these laws? When it is proposed to revolutionize our

land laws, it is not surprising to find some of our best and most influential lawyers opposing it. The honesty of purpose and the integrity of these gentlemen cannot for a moment be questioned. They simply cannot see any good in the means of reform proposed. It is true most of these gentlemen see and admit the deplorable defects in our present land laws, but they oppose the suggested means of reform. If the powerful intellects and far reaching influences of these gentlemen could be enlisted in an effort to draft and to pass a legislative bill looking to a correction of the evils of our present system, the profession as a whole might escape the censure and criticism of the public for present conditions.

This paper is not offered the profession as a suggested remedy for but as a diagnosis of our present registry ills. It is with the hope that by continual hue and cry the great body of Virginia lawyers may be aroused to our well nigh criminal indifference to the most glaring defect in the law.

In feudal days the tenant could live upon his land, he could till it and improve it, sell the usufruct and produce from it, but he could not sell the land itself. He could not exchange it for other land, he could not pledge it for his needs no matter how urgent they were. The land was to be used as soil—nothing more. Hence little machinery was provided by law for transferring it from one man to another, but, on the contrary, every means was taken to discourage and prevent it. When transfers became allowable livery of seisin gave sufficient notoriety of the change of title.

Livery of seisin was both a means of transfer and a registry of transfer and was quite sufficient for the means of the simple people who used it. As men multiplied and the art of war gave way to the peaceable usages of husbandry and trade, and land transfers became more frequent, other means of transferring and recording titles than livery of seisin and the fallible memory of neighbors, had to be found.

The old system had been outgrown; its restrictions had become burdensome; the needs of advancing civilization demanded greater freedom in encumbering and transferring land than feudalism had allowed, and a more permanent record of such

transactions than was offered by livery of seisin. Then the lawmaking power revolutionized things by passing the Statute of Uses. Doubtless the old lawyers of that day lifted their brows in astonishment at this drastic measure passed by an impious parliament and predicted dire results to the vested rights of the people. Without doubt those old limbs of the law pictured, in much the same language as was recently heard in Virginia, how the removal of the ancient shackles from land would surely cause the weak and foolish, the spendthrift, the gambler and the drunkard, to squander their inherited estates in riotous living.

The importance of the Statute of Uses can hardly be overestimated. It provided the means of transferring land by deeds for over three hundred years in England (1536-1845) and gave to us in Virginia the forms of deeds which were freely used until 1850, when our statute (Code, 2417) made land to lie in grant.

Under the operation of "bargain and sale," which resulted from the Statute of Uses, the legal title of land was transferred without livery and without writing. Professor Graves in his unpublished notes on real property, page 127, says: "This was considered so much against public policy, as preventing the necessary *notoriety* in the conveyance of the land, that another statute (called the Statute of Enrollments) was passed soon after the Statute of Uses (in the same year) which declared that a bargain and sale of any estate of freehold or of inheritance in land should be by *deed*, which deed should be *recorded*, the record being considered to give publicity, as a substitute for the notoriety of livery of seisin." Thus was born the first registry act of England.

The laws of England had not advanced beyond this simple condition when Virginia was settled, just three hundred years ago. The English colonists in Virginia brought over with them the English laws and deeds of lease and release, bargain and sale, and covenants to stand seized became as familiar in Virginia as in Merry England. It is to be remembered that these three methods of transferring the title to land were based entirely upon fictions created by necessity and given effect by the Statute of Uses. A fiction of law has always been the legal way to defeat the hardship of the law.

From 1845 in England and 1850 in Virginia land has been made to lie in grant and passes by deed. It is certain that no better method of conveying lands will ever be devised than by deed. It is the culmination of conveyancing and will always be used.

But there were other means of transferring title to property besides conveyances; there were descents and, after the Statute of Wills, devises—why was not some evidence of these changes of title required to be given publicity? Perhaps under the law of primogeniture the oldest son was so well recognized as heir that all the neighbors and persons likely to deal with the land knew to whom the land descended; and wills were required to be recorded, after a fashion. But the law of primogeniture has been abolished and, by means of quick transportation and quicker communication, space has been annihilated and a man's neighbors are now bounded by the confines of a continent. The printing press and modern business agencies make us almost as familiar with, and as interested in, the lands of a distant state as in those of our next door neighbor. The complex affairs of modern civilization, the sharp struggle for existence, the infinite division of labor which compels us all to be specialists, and to attend strictly to our own business, prevent an intimate knowledge of the heirs of distant neighbors. We no longer know the business of our neighbor. Common report is uncertain and conflicting.

When land was cheap, as it was in Virginia in colonial days, a grant of land described as being on the west bank of the James River in Isle of Wight County, Virginia, beginning at a certain gut, thence up said river to a small creek and thence "back into the woods between parallel lines until ten thousand acres are included," might be sufficiently accurate for those days. But since land has grown so valuable that it is sold by the front foot or even by the inch, better descriptions are demanded and more permanent evidence required than exists in common report or neighborhood talk.

There were, until comparatively recent times, both in England and Virginia few liens on land. But with advancing years land has lost some of the sacredness in which it was held in feudal days, and has been made more and more a commercial asset.

As the requirements of business demanded, the legislature has created new liens and charges on land. Some are in writing, some are not. Some must be recorded, some remain *in pais*. Several are required to be recorded in one set of books. Some are required to be recorded in separate books. Some are allowed to remain inchoate and, after a lapse of a certain time, suddenly ripen into a perfect lien without any written evidence and without registry. This has led to confusion.

It would seem that the same need for deed and record which displaced livery of seisin as a means of conveyance, would require some writing and recordation of descents. If purchasers and creditors are entitled to notice of a mortgage, why are they not entitled to notice of a claim for dower?

The evolution of our land laws has been from a few simple transactions the evidence of which was wholly *in pais* to many complex transactions, each confusing the title, while the evidence of these title obscuring transactions, lies partly *in pais* and partly of record. The next step in the perfection of our law is to require the evidence of every transaction which affects the title to land to be wholly of record.

We no longer live in a simple state of society; feudalism with its fetters to land should disappear. We are a commercial people and land, the source of all wealth and the indirect basis of all credit, should be a readily-transferable commercial asset. We have befogged our titles in a cloud of liens and claims, and have provided no system worthy of the name for their orderly recordation. We have attacked titles with twentieth century liens and claims, and have protected purchasers and creditors of titles with sixteenth century registry acts. As well match the tiny wooden caravels of Columbus against a modern twelve-inch Krupp gun. Is there any wonder our titles are always uncertain and that few wish to hazard a law suit by buying land unless he is compelled to?

The modern landowner is but little better off than his feudal ancestor. Owing to our antiquated registry laws the modern owner gets but little more than the mere physical use of his property. The nominal power to pledge or alien his land is, in practical experience, often a promise only to the heart. The uncertainty of *all* titles and the delay, difficulty and expense of

proving the validity of *his* title often deprives him of a loan or prevents a sale. The patriotic citizen who invests in Virginia real estate is compelled, like the wicked and slothful servant, to bury his treasure in the ground.

Think for a moment of the enormous value of land as a commercial asset if the titles were absolutely certain and transfers were simple, cheap and easy. If John Doe, a farmer whose crop failed, desiring to cultivate a part of Blackacre which had before gone to waste, in order to retrieve his fortune, could carry his land into the market as a merchant under somewhat similar circumstances can carry a bond secured by a deed of trust on real estate, and throwing on the bank's counter an unimpeachable certificate, obtain ready money on it, promptly, without delay, uncertainty or expense, how old Virginia would blossom like a rose, for money is to the body politic, what healthy blood is to the body natural. And why shouldn't this be the case? Why should the merchant be able to secure a quick loan on a bond which is secured by a deed of trust on land, when the farmer cannot get the same loan on the land itself? The maker of the bond may become insolvent; his personal property may be destroyed in a night; he may die and it be found that his debts far exceed his assets; while land is unchanging, indestructible, the fountain of all riches; the source of all that man uses, eats or wears. Why should the mutable be a better commercial asset than the immutable? It is because the title to the farmer's land is uncertain, and the busy banker hasn't time to examine into it, nor will he take the risk of examination himself as he would probably know no more afterwards than before about it, and to get a lawyer to make the examination is both expensive and tedious.

Compare the situations of our old friends John Doe and Richard Roe. Each is given by their father \$1,000. John buys farm land with his money on which he works hard all the year round, cleaning up new ground, planting, reaping and helping to feed the people of Virginia, giving employment to labor, paying taxes to the State and in every way helping to build up the Commonwealth. By hypothesis he makes a living and four per cent. clear. Richard invests his money in the listed bonds of a New York Railroad, which pays four per cent. and he makes his living

on the stock exchange. Now let us suppose that sickness or crop failure, or fire compels both John and Richard to need ready money. Richard takes his bonds to bank, pins them to his own note, and draws their face value on them. The transaction is completed in a few minutes, without publicity, annoyance, loss of time or expense. Now let John go to the same bank and offer his land as security for his note. What happens? If the bank makes the loan at all (and many banks will not lend on such security because land is a "slow" asset and cannot be quickly converted into cash) it will lend only two-thirds of the value of the security on it. Then the bank must have the title to the land examined and passed upon by its own lawyer; a deed of trust must be written and recorded; the tax list must be searched; and, if there is a house on the land, an insurance policy must be transferred. All of these things take time. Some of them are, because of the inherent nature of the property, unavoidable. If the bank's attorney happens not to be busy he may examine the title next day; or it may be next week before he can do so. This delay may not injure the bank or the lawyer, but if John's wife has appendicitis and the money is needed to send her to a hospital, John might get the money in time to pay the undertaker's bill. And the expense—examining title, \$10; drawing deed of trust, \$5; recording deed, \$2.25; total, \$17.25 on a loan of \$666.66 or a tax of about two and one-half per cent. To the captious who say that the cost would be but little more if the loan was \$10,000 I reply, it would be but little less if the loan was only \$100, and I vouch the records of Virginia to maintain the assertion that the average loan on real property in Virginia is considerably less than a \$1,000. Ask yourself which of these men is the best citizen, and which one is most favored by the law?

The object of registering deeds is to inform the public of the condition of the title to land. When we examine the records in the clerk's office we generally want to know who owns Blackacre and what are the charges or liens on it. The account we want is an account of the title to the *land*—not a senseless repetition of the same deed copied a dozen times with only a change in the names of the parties. What difference does it make to us, if it does not affect the title to the land, whether John Brown owned Blackacre in 1794, or Sam Johnson owned it in 1828 or Henry

Brown owned it in 1869, etc.? Why should the searcher after knowledge of the condition of Blackacre's title, be compelled to wade through a hundred books of 600 pages each and step by step, follow the title through its various owners, making collateral excursions through judgment dockets, delinquent land books, will books, chancery suits, and the thousand other pitfalls that threaten titles? Why not keep everything affecting the title to Blackacre on one page of one book, or better still, on a card in an index file, just as a modern merchant keeps your store account. What would be thought of a merchant who kept his accounts as we lawyers allow the accounts of our land titles to be kept? Suppose you went to your grocer to ask how much you owed him and he should say, "I'll have to get an expert to tell me; call again next week." Then diligently the expert searches. But the foolish merchant has entered your first item on page 1 of book 3; your second purchase on page 29 of book 16; your next item on page 524 of book 47 and so on through a hundred and fifty books of six hundred pages each. And to make confusion worse confounded, some of the items have not been entered at all and all of them have been indexed in different names. Do you think you could rely with any security upon the correctness of your account? And in your state of uncertainty, would you be quick to pay your bill, or if you were not the debtor, would you like to lend the merchant money on this account and take an assignment of it as security? And yet the store account here pictured is far more accurate and reliable than the records of our land titles under our present antiquated system of keeping them.

What one wishes to learn and what the records in the clerk's office should reveal is, who owns Blackacre, what are its boundary lines, what liens and charges are on it? I make so bold as to assert that there is not a lawyer in Virginia, who is unacquainted with the land or the people, who can go into any county clerk's office in the State, and from the records alone learn the exact condition of the title and point out the actual boundary lines of five per cent. of the land in such county. And any one who is disposed to question this statement is requested to just try it once. The examination of titles is but little more than guess work, and the chief reason more disasters from such examinations are not

reported is that the real owner's title or lienor's claim cannot be found in the records.

Last week, as a commissioner in chancery, I was directed by the court to ascertain and report to court a list of the real estate of which James T. Smith died, seized and possessed, together with the liens and charges thereon. I had never known the deceased. The clerk, who usually knows everybody and their business, happen to lack knowledge concerning this particular Smith. The land book was examined in each of its four sections. (The four magisterial districts of the county are separately kept.) Smiths were found in all of them; J. T. Smiths by the dozen. Then there were James T. Smith, James Thomas Smith, J. Thornton Smith, James Thorogood Smith, Jim Smith, James Smith, Smith, Smith, Smith—world without end! Nothing definite could be learned from this source. Counsel for the parties was 'phoned to; it was a friendly partition suit. No; his clients were distant relatives of the deceased and lived in another state, and neither they nor he knew anything more than was set out in the bill, which described three small tracts of land. At least here was a start. The bill was secured and read. A deed was found. It described one piece of land something after this fashion: "A tract, piece, parcel or lot of land," (these deeds always give accurate descriptions of the quantity of the land), "lying, being and situate," (as if the land could "lie" in one piece and "be" in another), "in C. magisterial district in N. County, Virginia, said to contain fifty acres, more or less, but this land is sold in gross and not by the acre, and bounded and described as follows, to-wit, beginning at a small pine tree" (the deed was dated in 1864, the year Grant's army was shooting down and burning a few pines—what they left the saw mill man got), "thence to a black-gum, thence to the run of the swamp, a corner with J. Peter Holland's home place," (Joe Peter was killed around Petersburg and his land partitioned and sold) "thence to a lane leading to Mrs. Brown's place, thence along said lane to the point of beginning. Said land is bounded by the lands of Joe Peter Holland, John Jones, Adam Everett and the said lane."

There were only one hundred and fifty square miles in C. Magisterial District of N. County, Virginia, and probably a few

less than fifty million pine trees. Should the examiner's acquaintance happen to include Joe Peter Holland, Mrs. Brown, *et al.*s. and their land, he might get somewhere within a few hundred yards of the boundary lines—at least, where the boundary lines were in 1864.

The general index to deeds showed that one James T. Smith had purchased ten pieces of land and sold eight. If this was the man whose lands the inquisitive court wished to know about, (and I was led to believe it was because one of the deeds in a chain of title mentioned the name of the father of one of the complainants in the bill—nothing else), then his account seemed to check one piece over. Had he inherited it from an ancestor; if so, from whom? Had it been devised to him; if so by whom? Had he acquired it by adverse possession? And if he acquired title by any of these means, how was one to tell by the records in the clerk's office? Our registry laws make absolutely no pretense to record, with any degree of accuracy, any of these three means of acquiring a title.

After a day's diligent work all the deeds in which a James T. Smith (whether the right one or not, was only guess work) appeared as grantee, were copied in one column and those in which he was grantor copied in another. Then the descriptions were compared to learn which of the land bought by him had been sold. Mercy! Only two tracts sold by him were described by the same language as in the corresponding deeds of purchase. One large tract had evidently been sold off in small lots, and how much land was left, it was impossible to tell. Another piece had been bought jointly with two others and it had afterwards been divided by cross deeds which described each one's part as "about one-third, etc., bounded by a rail fence (long ago rotted down) a hedge row, oak stump, etc." None of the descriptions in the purchase deeds accorded with the descriptions in the bill which, it seems, had been made from the land itself as known to the parties and not from the records.

It is needless to go through the difficulties encountered in detail. I will content myself by setting down some of the questions which confronted me, the answers to which the records in the clerk's office either did not contain at all or kept them so imperfectly as to be of little value, or only partially revealed them, or

kept them in separate books with different indexes. All of these questions will be found to have some bearing on the title to land.

Who was James T. Smith's father, mother, grandparents? This was desired to search the will books for devises to him, though the same inquiry might apply to "his sisters and his cousins and his aunts." Was he married? If so, did his wife survive him or was she divorced or separated or was her dower barred by jointure? Did he have any children? Was there an administraton upon his estate? Were there any creditors? Had he been dead a year? Were his father, mother, sisters, brothers or anyone from whom he might inherit land, alive; and if dead, had they died intestate? Was any of the land, while held by Smith or any of his predecessors in title, involved in a chancery suit? Was it being condemned by the power of eminent domain? Had the clerk performed his duty and indexed every deed? Were the debts secured by deeds of trust wholly or partially paid off? Is some one claiming by adverse possession, inchoate or complete? Has some one a "pocket deed" which may be recorded in ten days? Has the land, unlike personalty, been declared forfeited for delinquent taxes? If so, has it been sold to another, and will or has he perfected his precarious title? Has the "land grabber" applied for it? Is there an outstanding will which may be proved within two years, or, will a will already probated, ex parte, be attacked within two years? Has the land been rented for any period, and if so, what is the rent and has it been paid? Has it been claimed as "Homestead" property; if so, is the valuation too small? Are there any deeds of trust, mortgages, crop liens, mechanics' liens, vendor's liens or options on the land? Are there any unsatisfied judgments or any lis pendens filed against it? These and a hundred other vexed questions confront every perplexed seeker after titles.

If the public has a right to know the condition of the title to a citizen's land, and we think it has, *then everything affecting the title should be recorded in the clerk's office*, as far as it is possible to do so. If our records are to contain only the *evidence* of title, and not the title itself, we owe it to him who is to judicially pass upon that evidence to make it complete. And for convenience sake, if for no other reason, the evidence of each case, the links and liens affecting each title, should be grouped together and not

remain *in pais* or hidden away among the countless thousands of leaves of hundreds of books, each with its imperfect index or no index at all.

It is not only the boast, it is the practice of the English people to keep their laws up to the requirements of modern demands. If the flexible common law can be stretched to meet the needs of the times, so well and good; but if it proves insufficient, if the old customs are outlived, if new conditions demand new treatment, parliament is quick to act and reform the old law or supply a new one. Witness some of their epoch marking statutes, *Quia Emp-tores*; the Statute of Uses; the Statute of Wills; and in more modern times, the rearrangement of the whole court system, the abandonment of common-law pleading and the "Land Transfer Act of 1897." And England is called a conservative nation. It is the proud boast of mechanical America that nothing is too good for the scrap pile. We claim, and rightly so, that our mechanical superiority to the world is due to our custom of constantly improving our machinery. If new conditions demand up-to-date tools, the old ones are mercilessly sacrificed. It is the survival of the fittest.

What has been the result of the work of the Virginia Bar in the improvement of our land laws? Worse than nothing! Instead of simplifying, co-ordinating, perfecting our system of land titles and registration, we have attempted to bolster up a worn out system by patching and tinkering. New rights against land have been established, new liens devised, new claims created. The public—purchasers and creditors—have a right to and must know of the existence of these liens and charges. To meet this requirement the law which creates the lien, contemporaneously, or after some disastrous experience, provides that some sort of written evidence of such lien or charge be recorded. The multiplication of these liens, each with its independent record book and index, makes new pitfalls for the unwary, befogs the already confused title, depreciates values and clogs the transfer of land.

We have shunned the responsibility of rebuilding our system. We have been content from time to time to patch up the leaking hulk hoping to be carried through the storm, while each patch is increasing the danger we seek to avoid.

We must either deny the need of reform or confess our in-

ability to reform our present land laws. That reform cannot longer be delayed if Virginia is to enter that renaissance period which those who have watched hope and believe is at hand, cannot be doubted. And I, for one, am unwilling to believe that the genius for lawmaking once inherent in the blood and indigenous to the soil of our beloved Commonwealth, is altogether dead.

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